STATE OF MICHIGAN

COURT OF APPEALS

RANDY BROOKS and CHRISTINE BROOKS, Individually and as Next Friend of JOSHUA BROOKS, a Minor,

Plaintiffs-Appellants,

v

ROBERT RUSSELL NICHOLS, LORI ANN LEMESSURIER, ROBERT NICHOLS, and BRIDGETT NICHOLS,

Defendants-Appellees.

UNPUBLISHED
May 19, 2005

No. 260106
Kalkaska Circuit Court
LC No. 03-008252-NI

Before: Bandstra, P.J., and O'Connell and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order granting summary disposition in favor of defendants. We affirm.

This case arises from a snowmobiling incident involving several young persons and three vehicles. Robert Russell Nichols drove one snowmobile in pursuit of the two others, along a straight section of a trail ahead of a sharp turn. At the turn, the operators of the two other snowmobiles had slowed or stopped. When Robert Russell Nichols reached the turn, he passed one snowmobile and then collided with the other, and in the process fractured the leg of Joshua Brooks. Nichols was cited for operating the snowmobile at an unreasonable speed.

Plaintiffs sued defendants alleging negligence and negligent supervision. The trial court granted defendants' motion for summary disposition on the ground that the action was barred by MCL 324.82126(6), which provides that each participant "in the sport of snowmobiling accepts the risks associated with that sport," including "collisions with . . . other snowmobiles . . . ."

We review de novo a trial court's decision on a motion for summary disposition. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

The doctrine of assumption of the risk bars a person's recovery "when he voluntarily exposes himself to a known and appreciated danger." Black's Law Dictionary (6th ed, 1990), p 123. At common law, assumption of the risk did not exclude injury resulting from another's

negligence. See *Felgner v Anderson*, 375 Mich 23, 45 n 6; 133 NW2d 136 (1965); *Schmidt v Youngs*, 215 Mich App 222, 224-228; 544 NW2d 743 (1996).

This case is governed by specific statutory language concerning liabilities attendant to snowmobiling. We review de novo questions of statutory interpretation. *Hines*, *supra* at 437. When construing a statute, our primary obligation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute. *Id*. At the time of the incident, MCL 324.82126(6) provided in pertinent part:

> Each person who participates in the sport of snowmobiling accepts the risks associated with that sport insofar as the dangers are obvious and inherent. Those risks include, but are not limited to, injuries to persons or property that can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; or collisions with signs, fences, or other snowmobiles or snow-grooming equipment.

Shortly after the incident giving rise to this litigation, the Legislature amended this subsection to add the following language: "Those risks do not include injuries to persons or property that can result from the use of a snowmobile by another person in a careless or negligent manner likely to endanger person or property." 2003 PA 2, effective April 22, 2003. With the addition of the new language, the statute reflects traditional principles of the doctrine of assumption of the risk, according to which it does not excuse actual negligence. The question before us, then, is whether the statute as it read before the amendment extended the concept of assumption of the risk to cover negligent breaches of duty.

The trial court adopted as persuasive this Court's opinion in *Kaufman v Schaedler*, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2004 (Docket No. 249173). In that case, the majority[1] observed that the snowmobiling statute limits liability stemming from snowmobile collisions in language closely mirroring that of the Ski Area Safety Act, MCL 408.321 *et seq*., which has been interpreted as sharply limiting liability stemming from collisions between skiers. *Kaufman*, *supra* at 4, citing MCL 408.342(2); *McCormick v Go Forward Operating Ltd Partnership*, 235 Mich App 551; 599 NW2d 513 (1999). The majority regarded the amendatory language as changing the substance of the exception, not as merely clarifying the original meaning. Indeed, the Legislature's "use or omission of language is generally presumed to be intentional." *Carson City Hosp v Dep't of Community Health*, 253 Mich App 444, 448; 656 NW2d 366 (2002). Accordingly, the majority declared that plaintiffs injured in a negligently induced snowmobile collision did not have a cause of action under the old wording, but would have one under the amended version. *Kaufman*, *supra* at 3.

Kaufman, *supra*, closely mirrors the facts in the instant case. Although we are not bound to follows unpublished opinions, MCR 7.215(C)(1), we agree with the trial court's decision to decide this case consistently with *Kaufman*, *supra*. Accordingly, the version of MCL

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[1] With one judge concurring in the result only.

324.82126(6) in effect at the time of the incident shielded defendants from liability in connection with the snowmobile collision.

Plaintiffs also argue that the evidence suggested that Robert Russell Nichols was operating the snowmobile with a reckless frame of mind rising to the level of wilful and wanton misconduct. Wanton and wilful misconduct differs from ordinary negligence in that such conduct "shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." *Hill v Guy*, 161 Mich App 519, 524; 411 NW2d 757 (1987).

Plaintiffs specifically take issue with Nichols' operating the snowmobile at an excessive speed at the time of the collision, and having earlier, while still in a driveway, deliberately tilted his snowmobile, nearly causing it to roll over. *Kaufman, supra*, is instructive on this issue. That case involved two snowmobilers approaching head to head on a narrow trail. The plaintiff pulled to one side hoping to let the defendant pass, but the latter took no such precautions and instead struck and injured the plaintiff. *Kaufman, supra* at 1. Following the persuasive holding in *Kaufman, supra*, the trial court concluded that, even assuming that the defendant driver was "extremely negligent," statutory immunity applied. The trial court later stated, in response to an inquiry from counsel, that plaintiffs had failed to show recklessness, referring to recklessness in the sense of wanton and wilful misconduct, not ordinary negligence. The trial court therefore did not consider, and was not required to reach, the question whether wanton and wilful misconduct constituted an exception to the immunity provided by MCL 324.82126(6). The evidence before the trial court was not sufficient to prove intentional misconduct, or wanton and wilful recklessness. What plaintiffs point to suggests, at worst, ordinary negligence, taking the form of a cavalier attitude. For these reasons, we affirm the judgment below.

We affirm.

/s/ Richard A. Bandstra
/s/ Peter D. O'Connell
/s/ Patrick M. Meter